Supreme Court, U.S.
FILED

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No.

In The
Supreme Court of the United States

ALCOHOL FOUNDATION, INC., *Petitioner,*
UNITED STATES OF AMERICA EX REL. ALCOHOL FOUNDATION, INC., *Respondent,*

Alcohol Foundation, Inc. *Plaintiff-Appellant,*
U.S.A., ex rel. Alcohol Foundation, Inc.,
Plaintiff-Appellee,
v.
Kalmanovitz Charitable Foundation, Inc., Austin, Nichols & Co., Inc., E.& J. Gallo, Inc., Fortune Brands, Inc., Beer Institute, Beringer Wine Estates Holdings, Inc.,Distilled Spirits Council of the US, Inc., Seagram and Sons, Inc., Bacardi-Martini USA, Wine Institute, Deluca Liquor & Wine, Inc., S&P Company, Todhunter International, Inc., Heineken U.S.A., Inc., Southern Wine & Spirits of America, Inc., and John Doe's to be named,
Defendants.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Second Circuit

PETITION FOR WRIT OF CERTIORARI

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54 pp

QUESTIONS PRESENTED

(1) Did the Second Circuit further split the circuits and at the same time violate the principals of Equal Protection jurisprudence when it dangerously extended the definitions of "original source" and "public disclosure" used in *U.S. Ex Rel Kreindler v. United Technologies*, 985 F.2d 148 (2d Cir. 1993), and by affirming the District Court's decision in *U.S. ex rel. Alcohol Foundation, Inc. v. Kalmanovitz Charitable F.* wherein the District Court further excluded those who could be "relators" under the False Claims Act, by its unprecedented barring of the use of any and all "published materials"–including academic databases and scholarly journals–as an "original source" basis for bringing a qui tam suit under 31 U.S.C. 3729 et seq?

(2) Though ethics issues were raised at District and Circuit Court levels concerning the similarities of fact between the Attorney General's public recusal in the Enron investigation and the current case where beverage alcohol producer/defendant Anheuser-Busch had previously given thousands of dollars of election campaign money to the Attorney General, were the Courts in error for not overseeing appointment of a special Attorney General in the instant matter?

LIST OF PARTIES

The Second Circuit caption list of parties is missing one originally named party. On appeal to the Second Circuit, there appears to have been a clerical error between the District Court and the Second Circuit resulting in the mistaken electronic removal of the name of defendant Anheuser-Busch from the Second Circuit caption.

CORPORATE DISCLOSURE STATEMENT

The Alcohol Foundation, Inc. is a not-for-profit corporation incorporated under the laws of North Carolina. There is no parent corporation nor publicly held stock.

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Petitioner (hereafter "the Foundation" or "the Alcohol Foundation") respectfully prays for a writ of certiorari to review the judgment below of the Court of Appeals for the Second Circuit, entered December 13, 2002, affirming the decision of the United States District Court for the Southern District of New York filed February 26, 2002.

OPINIONS BELOW

The opinion of the United States Court of Appeals for the Second Circuit appears at Appendix A to the petition and is reported at 53 Fed. Appx. 153 (2d Cir. 2002) and has not been designated for publication. The opinion of the United States District Court for the Southern District of New York is reported at 186 F. Supp. 2d 458 (S.D.N.Y. 2002).

JURISDICTION

The United States Court of Appeals decided this case on December 13, 2002. No petition for rehearing was filed in this case. An extension of time to file the petition for a writ of certiorari was granted to and including May 12, 2003 on March 10, 2003 in Application No. 02A745 granted by Justice Ginsburg for good cause. The jurisdiction of this Court is invoked under 28 U.S.C. § 1254(1) and Rules 10(b) and 10(c) of this Court.

STATUTES AND REGULATIONS INVOLVED

Title 28 U.S.C. § 528, entitled Disqualification of officers and employees of the Department of Justice, provides in pertinent part:

> The Attorney General shall promulgate rules and regulations which require the disqualification of any officer or employee of the Department of Justice...if such participation may result in a personal, financial, or political conflict of interest, or the appearance thereof.

Title 28 U.S.C. § 530B(a) entitled Ethical standards for the

Government, provides in pertinent part:

> An attorney for the Government shall be subject to State laws and rules, and local Federal court rules, governing attorneys in each State where such attorney engages in that attorney's duties, to the same extent and in the same manner as other attorneys in that State.

Title 31U.S.C. § 3729, provides in pertinent part:

> (a) Liability for Certain Acts. - Any person who:
> (1) knowingly presents, or causes to be presented, to an officer or employee of the United States Government... a false or fraudulent claim for payment or approval;

Title 31 of U.S.C. § 3730, provides in pertinent part:

> (5) Notwithstanding subsection (b), the Government may elect to pursue its claim through any alternate remedy available to the Government...
> (e) Certain Actions Barred. - ...
> D. (A)No court shall have jurisdiction over an action under this section based upon the public disclosure of allegations or transactions in a criminal, civil, or administrative hearing, in a congressional, administrative, or Government Accounting Office report, hearing, audit, or investigation, or from the news media, unless the action is brought by the Attorney General or the person bringing the action is an original source of the information.
> (B) For purposes of this paragraph, "original source" means an individual who has direct and independent knowledge of the information on which the allegations are based and has voluntarily provided the information to the Government before filing an action under this section which is based on the information.

Title 31 of U.S.C. § 3730(d)(1) provides in pertinent part:

> Where the action is one which the court finds to be based primarily on disclosures of specific information (other than information provided by the person bringing

> the action) relating to allegations or transactions in a criminal, civil, or administrative hearing, in a congressional, administrative, or Government Accounting Office report, hearing, audit, or investigation, or from the news media, the court may award such sums as it considers appropriate,..

STATEMENT OF THE CASE

The nature of this case is that the beverage alcohol industry has perpetrated a fraud on both government and consumers by conspiring to thwart regulation and to not inform the public, particularly the underaged, of negative health consequences of alcohol consumption. This leads to approximately 125,000 deaths per year and over $30 billion per year in related health care expenses, the largest part of which is paid by the federal government. Taxes raised by alcohol sales are a fraction of the cost of alcohol-related health care costs.

It should be understood from the outset that the Alcohol Foundation does not represent any group with a political agenda, and it has no desire for a return to Prohibition. The Alcohol Foundation does espouse public health advocacy, helping to represent the interests of the unrepresented, and protecting the public fisc.

Proceedings Below

Alcohol Foundation, Inc., (the Relator) commenced this action by filing a complaint under seal on August 22, 2000, as a relator under the False Claims Act, 31 U.S.C. §3729-33 (FCA). Relator Alcohol Foundation claimed that the defendants, corporate entities who either own or are in the business of manufacturing and distributing beverage alcohol, have misrepresented the safety of their products to the consumer, and thereby caused claims–based on manufacturers' fraudulent misrepresentation to the consumer–to be presented to the government for healthcare treatment of alcohol-related illness.

The Relator is not a typical example of a *qui tam* relator, nor is it an "industry insider." Its founders have more than a quarter century each of personal and professional experience with the consequences of inappropriate use and abuse of beverage alcohol. Though none of us has ever been employed by the beverage alcohol industry, we (Relator's staff) have done extensive research into the clinical and public policy aspects of alcohol production, marketing, and consumption. This work allows us to have a special insight into the issues of fraud in the beverage alcohol industry not available to those not intimately familiar with the medical, social and public policy issues relating to the production, distribution, marketing, and consumption of beverage alcohol in the US.

The similarities between the 1998 federal tobacco litigation and the issues surrounding alcohol abuse and addiction seemed obvious. So the Relator decided to try a related approach to recovering the billions of dollars of alcohol-related health care costs paid for by the federal government.[1] Thus, in August 2000, the Relator filed its complaint under the theory that the marketing of beverage alcohol subjects the industry to common law fraud for intentionally *not* showing in *any* of its advertising the cautionary information required on its labeling, and for its intentionally withholding any cautionary information from *all* of its advertising. The marketing of the alcohol beverage industry is done in a negligent manner, was and is violative of consumer rights, and is deceptive. This marketing is a "substantial factor" in the federal government having to pay over 12 billion dollars in alcohol-related health care in fiscal year 2000.[2] (The state financed portion of Medicaid is an

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[1]At the time in August 2000, when Petitioner/Relator Alcohol Foundation filed a complaint in the Southern District of New York against the alcohol industry, the federal government was annually pouring out billions of dollars (an estimated $12.5 billion in 2000, closer to $15 billion annually today) on alcohol-related health care.

[2]One look at any advertising, television, radio, print, internet, will show a total void of any health warnings. The small warnings on the labels of the actual containers are never shown or read in any of the advertising, and are

(continued...)

additional similar amount.) It seemed reasonable to the Relator that the FCA and the Medical Care Recovery Act (MCRA) could be used for the Relator's purpose to hold the beverage alcohol industry liable as the proximate cause/substantial factor ["knowingly presents or ***causes to be presented***"health care bills that are based in fraud (31 U.S.C. § 3729(a)(1))] for nearly all the alcohol-related health care costs and related bills submitted to the Government.[3]

This case was brought using the FCA for several reasons. (1) This case was filed to *force* the Government to investigate, despite the usual resistance, the marketing methods of the beverage alcohol industry which are also a substantial factor in the federal government's expenditure of billions of dollars on alcohol-related health care. (2) The Government is *not* bound by the "original source" bar. The FCA allows the Government to use any other provisions of law under which to pursue this matter. (3) The MCRA is available to recover damages incurred as a result of a defendant's tortious/fraudulent conduct. (4) The 1986 revisions of the FCA eliminates the distinction between Government claims on behalf of torts against military personnel, and Government claims for fraud generally. (5) Used with the FCA, the MCRA should similarly no longer limit Government tort claims to members of the military. (6) The power and financial resources of the beverage alcohol industry are immense, and the government has the best access to communication regulation, alcohol regulation, and health care expenditures. The federal government is logically the entity that should shoulder the responsibility of particularizing a complaint to the extent needed.[4] (7) If the Government has an ethical conflict where its

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[2](...continued)
inadequate, ineffective, and incomplete.

[3]Medical Care Recovery Act, 42 USC §§ 2651-2653.

[4]The Tax and Trade Bureau of the Department of the Treasury recently revealed that the beverage alcohol industry engaged in fraud in the formulation of their "malternative" beverages. The formulae and labels
(continued...)

chief legal officer accepted substantial campaign funds from one or more of the originally named defendants, the courts should supervise the appointment of a Special Attorney General to investigate the case. (8) Industry-wide liability, requires a different type of "particularization," and calls for liability relating to tortious industry policies. (9) The public has a right to know just where its Government stands on these important issues so that it can knowingly exercise a meaningful right to vote.

Jurisdiction relied on by Relator was the FCA, whose wording appears to specifically allow for "substantial factor" causation (where fraudulent claims were submitted or ***caused*** to be submitted), and on the MCRA, which provided for the replevy of Medicaid funds spent as a result of tortious/fraudulent activity (like tobacco, alcohol failed to disclose the full extent of the risks of consumption, with current annual alcohol-related deaths now running at a rate of about 125,000).[5] The beverage alcohol industry consistently makes substantial profits, but pays not a dime for any of the damage its products cause, and the Government spends far more on alcohol-related health care than it will ever collect on alcohol taxes. Indeed, the cost of providing medical care is the major basis of the federal government's case against the tobacco industry. The only real difference between tobacco and alcohol industry product liability is that tobacco fraud was overt, and alcohol fraud is in the form of withholding information known to the industry and scientific community, but which was otherwise buried under the industry guise that "everybody knows" the dangers of alcohol. The fact is, "everyone" does *not* know the dangers of alcohol, and this is particularly so with the underaged.

The original "Disclosure Document," filed in the fall of

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[4](...continued)
deliberately confused regulators into collecting only half the alcohol tax due since the alcohol in these beverages was coming from spirits alcohol and not fermented alcohol. *See infra.*

[5]Disclosure document. McGinnis JM, Foege WH. Actual causes of death in the United States. JAMA 1993; 270: 2207-12.

2000, consisted of over a thousand numbered paragraphs on over 270 pages. This Document was later supplemented with two appendices, the first of which was turned over to the Government in February 2001, and consisted of some 238 pages, the second of which was turned over to the government in February 2002, and consisted of some 228 pages. These documents which were all filed originally with the District Court Clerk totaled some 736 pages of disclosure.

The Attorney General took approximately six months to review this case, extending the response time by asking for extensions to allegedly consult with Treasury, Defense, and Health and Human Services. The Attorney General declined to intervene and requested that the suit be dismissed and sealed permanently. There was never any direct contact with the Relator by the Attorney General. According to personal communication from Eric Fisher, then the Assistant US Attorney, SDNY, he was only a conduit between the parties, and that the matter was otherwise handled entirely in Washington, D.C. through the Office of the Attorney General.

On February 28, 2001, pursuant to 31 U.S.C. § 3730, the Attorney General (the "Government") notified the court of its decision not to intervene, and suggested the court should dismiss the matter for lack of subject matter jurisdiction *solely* on its claim the Relator was not an "original source," and that the case should be dismissed as "parasitic."

Though the Government could have taken over this action, and rendered the jurisdictional issues relating to "public disclosure" and "original source" moot, the Government declined to intervene. The Government's representative, the Assistant US Attorney, requested that *the record in this action remain under seal permanently*.

When the Relator raised the issue of a potential conflict of interest of the Attorney General, the Court required Relator to have personal knowledge of Mr. Ashcroft's participation in the instant case. The Relator was only aware of the remarkable similarity between the instant case–where over $70,000 had passed from Anheuser-Busch to the then Senator Ashcroft's 2000 election campaign in Missouri. And there was more for

his 1994 campaign, totaling in excess of $100,000–to the then widely publicized ongoing Enron investigation, where similar large amounts of money had gone to the Attorney General's election campaign.[6] In the Enron matter this resulted in the Attorney General's very public and dramatic recusal.

The court ruled on February 26, 2002, that it had no jurisdiction, and was bound by previous Second Circuit decisions. Attorney General Ashcroft's decision not to intervene stood. The court went on to even more narrowly define "public disclosure."

The second circuit reached its decision on December 13, 2002. The Court of Appeals, Hon. John Walker, presiding, affirmed the District Court ruling dismissing the Relator's case because in its opinion the Relator "merely compiled previously published research." Thereafter it imposed the Government's printing costs to be paid by the Relator.

To date, the Relator has relied entirely on volunteer efforts. No funds have yet been raised, and considerable volunteer time and expense has been expended.

REASONS FOR GRANTING THE WRIT

1: There is a Split in the Circuits on the False Claims Act

Some Circuits tend to restrict jurisdiction under the FCA. Those same courts are exponentially expanding the scope of exclusions that were originally limited by statute to certain very specific categories of disclosure. In other circuits there has been a tendency to enforce the literal and "plain English" wording of the FCA statute and the expressed intent of Congress to liberally construe the wording of the FCA, thus allowing a relator to be an "original source" while still using information that may otherwise be accessible to the public. The Circuits use different standards to interpret key concepts,

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[6]www.opensecrets.org. (Accessed for recheck May 10, 2003) *See also* www.commoncause.org.

especially "public disclosure" and "original source." Related to this is the question of whether Relator Alcohol Foundation's "disclosure" under the FCA [i.e. whether the beverage alcohol industry submitted or *caused* to be submitted false or *fraudulent* claims][7] was enough for the Government to set forth and recover on a fraud case against the beverage alcohol industry?[8]

THE FALSE CLAIMS ACT AND THE 1986 AMENDMENTS: The history of False Claims Act, 31 U.S.C. §§3729-3732, has been repeated in many court decisions even when the circuits come to vastly different conclusions as to the meaning of the words. The Act, originally passed during the Civil War, was known as the False Claims Act of 1863 (Act of Mar. 2, 1863, ch. 67, 12 Stat. 696 (1863 Act)). The False Claims Act (FCA or "the Act") established penalties for defrauding the federal government after Congress received reports of rampant fraud against the Union that included unseaworthy ships sold to the Union, and soldiers who opened musket cases to find only saw dust.[9] The Act provided that private individuals, called relators, as well as the Attorney General, could bring suit in the name of the United States. Should the suit be successful, then the person bringing the suit would receive a bounty. The FCA was amended on several occasions, most notably in 1943 and 1986. The 1943 FCA amendment was particularly directed

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[7]This would certainly be the case if, as it appears to be, the beverage alcohol industry's marketing is built on a foundation of consumer fraud, which thereby caused and continues to cause consumer injury.

[8]This was the main premise of the Government's case against the tobacco industry currently pending in Washington, D.C. ["Disclosure document."] *In re Tobacco/Governmental Health Care Costs Litig. v. Philip Morris, Inc.*, 76 F. Supp. 3d 5(D.C.D.C. 1999), *United States v. Philip Morris, Inc.*, 116 F. Supp. 2d 116 (D.C.D.C. 2000), *United States v. Philip Morris, Inc.*, 116 F. Supp. 2d 131 (D.C.D.C. 2000), and *United States v. Philip Morris, Inc.*, 2002 U.S. Dist. Lexis 11980 (D.C.D.C. July 1, 2002).

[9]Joshua W. Averill, *Encouraging Individuals to Report Government Contracting Fraud: The Anti-Retaliation Provision of the Federal False Claims Act Should Protect Everyone who Reports or Helps Prosecute Fraudulent Conduct*, 77 WASH. U. LAW QUART., 901 (1999).

toward the elimination of "parasitic" *qui tam* suits.[10] But the revisions had the unintended effect of eliminating most suits. The 1986 amendments were intended to revive an FCA otherwise garroted by the1943 amendments.[11]

Congress enacted the 1986 amendments after being informed of systemic fraud and mismanagement among defense contractors in the 1980s.[12] Disclosures during the Presidency of Ronald Reagan included questionable purchases such as $500 hammers and $7,600 coffee makers.[13] In its determination to revive the effectiveness of the FCA, Congress enacted the False Claims Amendments Act of 1986 (Pub. L. No. 99-562, 100 Stat. 3153) which substantially revised the Act "to make the statute a more useful tool against fraud in modern times."[14] Congress envisioned that the FCA would be "used as the primary vehicle by the Government for recouping losses suffered through fraud," particularly among defense contractors.[15] The paradigm *qui tam* case has been one in which an insider at a company brings an action against his or

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[10]Act of Dec. 23, 1943, ch. 377, 57 Stat. 608.

[11]The Eighth Circuit in *Minnesota Ass'n of Nurse Anesthetists v. Allina*, 276 F.3d 1032 (8th Cir 2002) referred to the 1943 amendments as having "emasculated the 1863 law."

[12]*See also*: S. Rep. No. 99-345, at 2-3 (1986), *reprinted in* 1986 U.S.C.C.A.N. 5266, 5267: "In 1985, the Department of Defense Inspector General, Joseph Sherick, testified that 45 of the 100 largest defense contractors, including 9 of the top 10, were under investigation for multiple fraud offenses. Additionally, the Justice Department has reported that in the last year, four of the largest defense contractors, General Electric, GTE, Rockwell and Gould, have been convicted of criminal offenses while another, General Dynamics, has been indicted and awaits trial," *as cited* in *U.S. ex rel. Roby v. Boeing Co.*, 302 F.3d 637, (6th Cir. 2002).

[13]Congressional Record: January 22, 2001 (Senate), page S79-S80. From the Congressional Records Online via GPO Access [http://wais.access.gpo.gov] [DOCID:cr22ja01-13] (Accessed April 24, 2003). "By 1986, eight out of the top ten defense contractors were under criminal indictment or criminal investigation for contract fraud."

[14]S. Rep. No. 345, 99th Cong., 2d Sess. (1986) (Senate Report).

[15]H.R. Rep. No.660, 99th Cong., 2d Sess. 18 (1986) (House Report).

her own employer (*U.S. ex rel. Fine v. Chevron USA, Inc.*, 72 F.3d 740, 742 (9th Cir. 1995) (*en banc*)).

Congress may well have envisioned that the FCA private attorney general provisions would be used primarily in defense and government procurement contracts. But there is nothing in the FCA that would limit its use to a single individual alleging specific instances of improper billing against one company. The 1986 Amendments eliminate all references to military contracts, and extended the FCA to *all* areas of federal government spending. The Act prohibits a variety of deceptive practices involving government funds and property.[16] There is nothing in FCA precluding using it for replevin for "industry-wide fraud."

Since 1986, fraud in defense contracting has given away to fraud in health care spending. Now, the majority of *qui tam* cases are related to improper health care bills for goods and services provided by physicians, hospitals, home health agencies and hospice agencies, medical equipment companies, medical supply services, and pharmaceutical companies under Medicare, Medicaid, and other government sponsored health insurance programs.[17]

Though Congress has written the provisions of FCA rather broadly, as Justice Stevens wrote in his dissenting opinion in

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[16]31 U.S.C. § 3729(a)(2)-(7). Specifically covered by the act are "persons" who "knowingly present" or "cause to be presented" claims for payment or approval.

[17]For example, the Office of the Inspector General of the Department of Health and Human Services reported that from calendar year 1996-July 2000, 1,074 *qui tam* allegations were received, of which over 300 were under active investigation. (http://oig.hhs.gov/reading/testimony/2000/00712fin.htm). *Accessed April 25, 2003.* Furthermore, information on the amount of payments to relators is available from *The Department of Health and Human Services and the Department of Justice Health Care Fraud and Abuse Control Program Annual Reports.* (*Available at:* http://www.usdoj.gov/dag/pubdoc/hipaa01fe19.htm.) *Accessed April 25, 2003.* Information on relator payments resulting from health care fraud is available for the following fiscal years: 1998: $4,344,610; 1999: $44,418,028; 2000: $90,027,273; 2001: $83,335,79.

Vermont Agency of Nat. Res. v. U.S. ex rel. Stevens, 529 US 765, 791(2000), "[t]he False Claims Act is also all-embracing in scope, national in its purpose..." Even so federal courts have placed restrictive and differing interpretations upon *qui tam* provisions never intended by Congress. The Courts have tended to limit the claims, especially using the "original source" rule that is discussed *infra*.[18] Or, the courts have linked the FCA with the need to plead with specificity as directed by FRCP Rule 9(b).[19] The relator must list details of the fraudulent acts such as when and where they occurred and who specifically was involved, even when the fraudulent scheme is described in detail.[20]

ARGUMENTS AMONG CIRCUITS ABOUT KEY CONCEPTS: Perhaps the provision that has provoked the most litigation is the so-called "*public disclosure bar*" of 31 U.S.C. § 3730(e)(4)(A) and (B). The plain wording of the law states that an FCA suit cannot be brought if based solely upon publicly available information from various court proceedings, from governmental reports or from news reports unless the person bringing the suit was the person who first unearthed the information. And, in fact, the FCA has provisions for the situation if the government proceeds with a *qui tam* suit, and

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[18]*See for example*: *Hays v. Hoffman*, ___ F.3d ___, 2003 U.S. App. Lexis 6725 (8th Cir. April 9, 2003).

[19]Fed.R.Civ.P. 9(b). Fraud, Mistake, Condition of the Mind. "In all averments of fraud or mistake, the circumstances constituting fraud or mistake shall be stated with particularity. Malice, intent, knowledge, and other condition of mind of a person may be averred generally." This need to particularize an allegation of fraud has proven problematic in a number of cases. *See for example*: *U.S. ex rel. Butler v. Magellan Health Services, Inc.*, 101 F. Supp. 2d 1365, (M.D. Fla. 2000), *U.S. v. Kitsap Physician Service*, 314 F.3d 995 (9th Cir. 2002), *U.S. ex rel. Clausen v. Laboratory Corp.*, 290 F.3d 1301 (11th Cir. 2002), and *Cooper v. Blue Cross & Blue Shield of Florida*, 19 F.3d 562 (11th Cir. 1994).

[20]One relator was barred from bringing a *qui tam* suit because he could not produce copies of specific fraudulent bills even though he described how the scam worked. (*U.S. ex rel. Clausen v. Laboratory Corp.*, 290 F.3d 1301 (11th Cir. 2002)).

the suit is substantially based upon public information from various court proceedings, governmental reports or news reports. The FCA sets up a sliding scale for the bounty to be paid to the relator if "the action is one which the court finds to be based primarily on disclosure of specific information...in a criminal, civil, or administrative hearing, in a congressional, administrative, or Government Accounting Office report, hearing, audit, or investigation, from the news media (31 U.S.C. §3730(d)(1)."

Instead of following the plain meaning of the statute, most federal courts inexplicably have set up a variety of meanings for the three phrases "based upon," "public disclosure," and "original source," and have come to differing conclusions as to what is covered under "public disclosure." These tend to be referred to as the "public disclosure bar" and "original source rule" though really these are interrelated provisions over which the circuits are split. Consequently the type of case that can be brought under the FCA differs widely among the Circuits. Only a very long treatise could analyze all the pieces and directions into which the FCA has been deconstructed. Just a few of the issues as they relate to the Alcohol Foundation will be discussed in the list following.

"BASED UPON" ARGUMENTS: The phrase "based upon" is not defined within the FCA and has been given somewhat different meaning among the federal circuits. One of the first courts to address the meaning of this phrase was the Fourth Circuit in *U.S. ex rel. Siller v. Becton Dickinson & Co.*, 21 F.3d 1339, 1348 (4th Cir. 1994). In *Siller*, the court defined "based upon" to mean "derived from" or "used as a basis for." And though this seems to be nearest to the meaning of "based upon" as written in the statute, this interpretation is a minority one. The Fourth Circuit definition of "based upon" is quite different from, for example, the definition developed by the D.C., Sixth, Ninth, Tenth, and Second Circuits.

The other circuits have, in general, taken the term "based

upon" to mean "supported by" or "substantially similar to."[21] Examples include: (1) The D.C. Circuit concluded in *U.S. ex rel Findley v. FPC-Boron Employees' Club*, 105 F.3d 673 (D.C. Cir 1997) that if the "information in the public domain was sufficient to enable the government to bring suit" without the relator's involvement, then the information was "based upon" publicly disclosed information, and thus barred. (2) The Sixth Circuit concluded that "in making this determination of whether an action is 'based upon' a public disclosure, a court should look to whether *substantial identity* exists between the publicly disclosed allegations or transactions and the *qui tam* complaint." (*U.S. ex rel. Jones v. Horizon Healthcare Corp.*, 326, 332 (6th Cir. 1998)) [emphasis added].(3) The Tenth Circuit interpreted "based upon" to mean "supported by," which includes any action based even partly upon public disclosures. Yet the Tenth Circuit found that just because the prosecuting authorities already had the information about the fraud, that was not necessarily a bar to pursuing a suit under the FCA (*U.S. ex rel. Precision Co. v. Koch Indus.*, 971 F.2d 548 (10th Cir. 1992). See also: *U.S. v. Consumer Ins. Group*, 318 F.3d 1199,1215 (10th Cir. 2003)(*en banc*)). (4) The Ninth Circuit disagreed with "based upon" as meaning "derived from," and defined it as meaning "supported by" or "same as" (*U.S. ex rel. Biddle v. Board of Trustees of Leland Stanford, Jr. U.*, 161 F.3d 533, 537 (9th Cir. 1998) or "substantially similar" (*U.S. ex rel. Lujan v. Hughes Aircraft Co.*,162 F.3d 1027, 1032 (9th Cir. 1998).

The Second Circuit's interpretation of the phrase "based upon" as meaning "same as" is similar to the Ninth Circuit. In *U.S. ex rel. Doe v. John Doe Corp.*, 960 F.2d 318 (2d Cir. 1992), the court held that "based upon" meant "the *same as* those that had been publicly disclosed prior to the filing of the *qui tam* suit" [emphasis added].

THE SECOND CIRCUIT'S CONCERN ABOUT "PARASITIC"

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[21] *U.S. ex rel. Mistick PBT v. Housing Authority*, 186 F.3d 376, 386 (3d Cir. 1999).

SUITS: In general, the Second Circuit is as concerned about whether the allegations in a suit are "based upon" any of the restricted sources as it is with whether the relator is the "source of the core information." (*U.S. ex rel. Kreindler v. United Technologies*, 985 F.2d 1148 (2d Cir. 1993)). This approach fits with the Second Circuit's concern that relators will be more motivated by the bounty than by a genuine desire to expose fraud. The Second Circuit reads the FCA to bar "'parasitic lawsuits' based upon publicly disclosed information in which would-be relators 'seek remuneration although they contributed nothing to the exposure of the fraud.'"(*U.S. ex rel. Doe v. John Doe Corp.*, 960 F.2d 318, 319 (2d Cir. 1992)).[22] A "parasitic" law suit is best described as one in which a person "otherwise unfamiliar with the situation, learns about the alleged fraud from a public disclosure and then attempts to file suit and capitalize on that information" (*U.S. v. Consumer Ins. Group*, 318 F.3d 1199,1215 (10th Cir. 2003)(*en banc*). As explained by the Third Circuit in *U.S. ex rel. Stinson, Lyons, Gerlin & Bustamante, P.A., v. Prudential Ins. Co.*, (944 F.2d 1149, 1154 (3d Cir. 1991)), Congress wanted to encourage whistle-blowers to bring information about fraud against the government while preventing law suits based purely on information that is already known to the prosecuting authorities. But, the circuits have taken an inconsistent approach to FCA interpretation, often adding conditions that tend to pull the teeth out of the FCA *qui tam* provisions.

PUBLIC DISCLOSURE: The focus of most of the Second Circuit analysis of the FCA is on the issue of if there is *any* "public disclosure," then, is the relator the "original source" of the information that has been disclosed? This interpretation of the FCA goes far beyond what other circuits require and seems to be contrary to the wording of the Act and the intention of Congress when the 1986 amendments were passed.

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[22]*See also*: *U.S. ex rel. Kreindler v. United Technologies Corp.*, 985 F.2d 1148 (2d Cir. 1993) and *Gold v. Morrison-Knudson Co.*, 68 F.3d 1475 (2d Cir. 1995).

The wording of the FCA seems to set up a simple two tier system for determining if there has been sufficient disclosure to be deemed a "public disclosure," and raise the "public disclosure bar." As expanded in *A-1 Ambulance v. State of California*, 202 F.3d. 1238, 1243 (9th Cir. 2000), the law would seem to set up a straightforward two part test:

The public disclosure question, in turn, requires that we make two distinct but related determinations. First, we must decide whether the public disclosure originated in one of the sources enumerated in the statute. Under 3730(e)(4)(A), public disclosure can occur in one of three categories of fora: (1) in a "criminal, civil, or administrative hearing," (2) in a "congressional, administrative, or Government Accounting Office report, hearing, audit, or investigation," or (3) in the "news media." If there has been public disclosure through one of these sources, we must then determine whether the content of the disclosure consisted of the "allegations or transactions" giving rise to the relator's claim, as opposed to "mere information." (*Hagood v. Sonoma County Water Agency*, 81 F.3d 1465, 1473 (9th Cir. 1996)).

Even when it comes to "public disclosure" there seem to be three different but interrelated issues present. (1) How available to the general public must a "disclosure" be before it is considered "public?" (2) Does the "disclosure" involve "allegations or transactions" or mere information? (3) Is the availability of the information source one that one might consider when deciding if a fraud is being perpetrated against the federal government, even if they are different from the proscribed sources listed in the FCA itself? The Third Circuit in *U.S. ex rel. Mistick PBT v. Housing Authority*, 186 F.3d 376, 388 (3d Cir. 1999) found §3730 (e)(4)(A) "to be syntactically ambiguous," and the source for much disagreement among the Circuit Courts of Appeal.

The different circuits are also considerably split as to how "public" "public disclosure" must be before being statutorily barred. The Ninth Circuit in *U.S. ex rel. Schumer v. Hughes Aircraft*, 63 F.3d 1512, 1520 (9th Cir. 1995) draws the line between information that is "*actually*, rather than *theoretically*

or potentially, available to the public." On the other hand, the Third Circuit in *U.S. ex rel. Stinson, Lyons, Gerlin & Bustamante, P.A. v. Prudential Ins. Co.*, 944 F.2d 1149, 1158 (3d Cir. 1991) held that information that had been exchanged between private parties through discovery but not filed with the court is "potentially accessible to the public and thus is publicly disclosed."

The Second Circuit seems to be more concerned about the possibility of "parasitic" suits than the probability that appropriate relators will be barred from bringing suit by the limiting language it has employed when it comes to publicly disclosed information. Instead of looking at whether the "public disclosure" is primarily *information* and not specific *allegations*, the Second Circuit looks only at whether the source of the information in the allegations is potentially available to *any* interested party. This contrasts with the Third (*U.S. ex rel. Dunleavy v. County of Delaware*, 123 F.3d 734 (3d Cir. 1997)), the Ninth (*Wang v. FMC Corp.* 975 F.2d 1412, 1418 (9th Cir. 1992)), and the Eleventh Circuits (*U.S. ex rel. Williams v. NEC Corp.* 931 F.2d 1493 (11th Cir. 1991)). All three of these Circuits make an important distinction between the actual allegations and information. "...[T]he act bars suits based on publicly disclosed 'allegations or transactions,' not information." (Wang at 1418). The Second Circuit is less interested in determining if the allegations are publicly known. The Second Circuit focuses on whether the information is in the "public domain." So instead of investigating the type and manner of apparent "public disclosures," to determine if they are "allegations and transactions" or mere information, the Second Circuit considers *any* public source of information as sufficient to raise the judicial bar against suits under the FCA. "We believe that if the information on which a *qui tam* suit is based is in the public domain, and the *qui tam* plaintiff was not a source of that information, then the suit is barred" (*U.S. ex rel. Dick v. Long Island Lighting Co.*, 912 F.2d 13 (2d Cir.

1990)).[23]

The Second Circuit stated that information obtained from sources other than those listed in the FCA were covered under the "public disclosure bar" (*U.S. ex rel Doe v. John Doe Corp.*, 960 F.2d 318 (2d Cir. 1992)). The following year the Second Circuit extended its position in *U.S. ex rel. Kreindler v. United Technologies*, 985 F.2d 1148 (2d Cir. 1993). In *Kreindler*, the Second Circuit determined that the FCA "bars any claim where a third party is the core source of information underlying that claim." (*Kreinder* as interpreted in *Gold v. Morrison-Knudsen Co.*, 68F.3d 1475 (2d Cir. 1995)). This Circuit seems to be unique in interpreting the list of prohibited sources listed in the FCA consists of mere examples. This extremely sweeping interpretation of "public disclosure," that would bar any *qui tam* cases other than the prototypical insider "whistle blower" bringing suit. Other Circuits have dismissed this exclusion as unreasonably broad.[24] The Second Circuit prohibits all *qui tam* suits that utilize actually public or potentially public information in any of the elements of the *qui tam* suit.

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[23] *U.S. ex rel. Stinson, Lyons, Gerlin & Bustamante, P.A., v. Prudential Ins. Co.*, (944 F.2d 1149, 1160 (3d Cir. 1991). The Third Circuit dismissed Stinson's argument that "knowledge of the insurance industry gave it the background necessary to understand the complex scheme by which Prudential allegedly defrauded the government." The Third Circuit instead focused on the sources of Stinson's information, not the specialized knowledge needed to interpret the information. In this respect the Third Circuit is nearer to the Second Circuit than the Fourth Circuit. *See* further discussion on "original source."

[24] See, for example, *U.S. ex rel. Schumer v. Hughes Aircraft*, 63 F.3d 1512 (9th Cir. 1995). "Under a 'practical, commonsense interpretation' of the jurisdictional provisions, information that was 'disclosed in private' has not been publicly disclosed." See also *Minnesota Ass'n of Nurse Anesthetists v. Allina*, 276 F.3d 1032 (8th Cir. 2002), *U.S. ex rel. Mathews v. Bank of Farmington*, 166 F.3d 853 (7th Cir. 1999), *U.S. ex rel. Ramseyer v. Century Healthcare*, 90 F.3d 1514 (10th Cir. 1996), and *U.S. ex rel. Springfield Terminal Ry. v. Quinn*, 14 F.3d 645 (D.C. Cir. 1994). In *Ramseyer* the court says "we agree with the District of Columbia and Ninth Circuits that 'public disclosure' signifies more than the mere theoretical or potential availability of information."

In its determination to promote a seriously flawed line of reasoning, the Second Circuit claims that *Kreinder* stands upon *U.S. ex rel. Precision Co. v. Koch Industries*, 971 F.2d 548 (10th Cir. 1992). The Second Circuit takes *Precision* to mean that suits under the FCA are barred if they are "based in any part upon publicly disclosed allegations or transactions." The Second Circuit has misconstrued the wording of *Precision* by limiting suits that rely in any way on any material that has been published. This is contrary to the facts of the case. The Tenth Circuit ruled that this particular *qui tam* suit could not be brought because it was based primarily on information publicly disclosed during a Senate Select Committee hearing, a prior Rico suit, and through numerous news articles. These are the very types of disclosures that are specifically barred under the plain wording of 31 U.S.C. §3730(e)(4).

As a matter of public policy, such reading of "public disclosure" to cover *any* information "in the public domain" as done in the Second Circuit thwarts the purpose of the FCA to prod the federal government into investigating fraud that otherwise might be "shoved under the rug," as seems to be the case with alcohol.[25] In addition, under this line of reasoning, if it can be shown that a fraud perpetrator had published some obscure facts relating to a fraud, that very publication of the facts would provide the perpetrator with immunity from suit under the FCA.

Judge Marrero in his district court decision in the instant case has expanded even further the definition of barred "public disclosure" of "allegations or transactions" to include informational data gathered from scholarly journals. Such scientific and scholarly publications are not "allegations or transactions" and cannot possibly be construed to contain

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[25]The Circuits have used the term "public domain" very loosely since most of the material cited as "in the public domain" is actually copyrighted. It is for this reason that the Alcohol Foundation, Inc. was extremely carefully to cite all the hundreds of sources of information used in the disclosure documents. This material from scholarly and scientific journals is all copyrighted.

"allegations" of fraud against the federal government.[26] By including scholarly journals and similar sources of informational data that contain no allegations of fraud in the "news media" exclusion, the FCA is even further limited to only those persons who fit the paradigmatic example of an inside whistle blower bringing suit against his or her employer.[27] In no other cases, has the plaintiff Alcohol Foundation been able to discover that scholarly journals were covered under the "news media" exclusion. Essentially Judge Marrero has further raised the judicial bar to *qui tam* suits by excluding from consideration *any* material that "had previously been prepared and made generally accessible to the public by third parties." Judge Marrero wrote in *U.S. ex rel. Alcohol Found. v. Kalmanovitz Charitable F.*, 186 F. Supp.2d 456, 462 (S.D.N.Y. 2002):

> ..if a third party first distributed information through any of the fora identified in § 3730(e)(4)(a), and a putative relator relied on that information in bringing a qui tam suit, a federal court lacks subject matter jurisdiction over the suit. (*Alcohol Found.* at 463)

This appears to be contrary to the expressed intent of Congress to make the prosecution of fraud on behalf of the federal government *easier* with the 1986 amendments to FCA. This also contrasts with the Ninth Circuit's interpretation in

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[26]Published sources of information need not include specific allegations of fraud. *Hagood v. Sonoma County Water Agency*, 81 F.3d 1465, 1473 (9th Cir. 1996) citing an earlier decision by the D.C. Circuit (*U.S. ex rel. Springfield Terminal Ry. v. Quinn*, 14 F.3d 645, 654 (D.C. Cir. 1994)) explains that "The substance of the disclosure, however, need not contain an explicit 'allegation' of fraud, so long as the material elements of the allegedly fraudulent 'transaction' are disclosed in the public domain."

[27]Two circuits other than the Ninth Circuit repeat with approval the quote from *Wang v. FMC Corp.*975 F.2d 1412, 1419 (9th Cir. 1992): "A 'whistleblower' sounds the alarm; he does not echo it. The Act rewards those brave enough to speak in the face of a 'conspiracy of silence,' and not their mimics." They are the Eighth Circuit (*Hays v. Hoffman*, ____F.3d ____, 2003 U.S. App. Lexis 6725, (8th Cir. 2003)) and the Sixth Circuit (*U.S. ex rel. McKenzie v. Bellsouth Telcoms.*, 123 F.3d 935 (6th Cir. 1995)).

Hagood, cited above, which does not include the use of "mere information" from a news media source to be a reason to invoke the "public disclosure bar."[28] If Second Circuit reasoning is allowed to stand, the public policy intent of the FCA to prod the federal government into prosecution of fraud will be considerably blunted.

Yet, it appears the Second Circuit does not want to go through the particularized determination necessary to see if information from published sources other than the traditional news media might trigger the "public disclosure bar." The Second Circuit treats *all* information from *any* published sources, as well as those specifically excluded in 31 U.S.C. § 3730(e)(4)(A), as being excluded as a matter of law because they are prepared by third parties which makes it potentially discoverable by persons not industry insiders. Those persons who would know about fraudulent practices but who are not deemed employee whistle-blowers would be considered "strangers to the fraud transaction" and excluded from bringing *qui tam* suits.[29] The result would be the very situation that the D.C. Circuit wanted to avoid when it ruled in *U.S. ex rel. Springfield Terminal Ry. v. Quinn,* 14 F.3d 645, 654 (D.C. Cir 1994):

> Many potentially valuable *qui tam* suits would be aborted prematurely by a reading of the jurisdictional provision that barred suits when the only publicly disclosed information was itself innocuous.

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[28]"If there has been public disclosure through one of these sources, we must then determine whether the content of the disclosure consisted of the 'allegations or transactions' giving rise to the relator's claim, as opposed to 'mere information.'" (*Hagood v. Sonoma County Water Agency*, 81 F.3d 1465, 1473 (9th Cir. 1996)).

[29]*U.S. ex rel. Stinson, Lyons, Gerlin & Bustamante, P.A., v. Prudential Ins. Co.*, (944 F.2d 1149, 1154 (3d Cir. 1991). "We read section 3730(e)(4) as designed to preclude *qui tam* suits based on information that would have been equally available to strangers to the fraud transaction had they chosen to look for it as it was to the relator."

ORIGINAL SOURCE: The Relator saw itself as being both an "original source" for piecing together and explaining a very complex picture of the beverage alcohol industry fraud, and as an "indirect source" for making a very complex picture of fraud understandable. In papers filed with the District Court the Relator did in fact claim that its 700+ pages of analysis and personal experience did entitle it to the status of being an "***original source***" within the "plain English" meaning of the words of the FCA. The Relator also claimed the extensive compilation and analysis it had performed was a "comprehensive review" that was "original" in that such an in-depth, complex analysis that was also broad in scope had never before been assembled or published. Nonetheless, the Second Circuit made no allowance for the possibility that original thought could be based (indeed had to be based) on something that at least in part had come before. This was in marked contrast to this Court's extensive discussion of what constitutes original scientific thought, found in *Daubert v. Merrell Dow Pharmaceuticals, Inc.*, 509 U.S. 579, 590 (1993).

The Second Circuit engrafts a wholly extra-textual requirement on the *qui tam* plaintiff. The relator is required to be the source of the allegations and information to the individual or organization or other entity that subsequently disclosed the allegations through the news media or in another manner. All the text of the FCA requires is that the relator (1) voluntarily provide the government with the information and that (2) have direct and independent knowledge of the allegations. The Second Circuit in its reasoning in *U.S. ex rel. Dick v. Long Island Lighting Co.*, 912 F.2d 13, 17 (2d Cir. 1990) refers to the added requirement as a "natural reading" that gives "effect to the intent of Congress." The Second Circuit spells out the three part test as to who may be an "original source" in *U.S. ex rel. Kreindler v. United Technologies*, 985 F.2d 1148, 1159 (2d Cir. 1993):

> ...that to be an 'original source' a qui tam plaintiff must (1) have direct and independent knowledge of the information on which the allegations are based, and (2) have voluntarily

> provided such information to the government prior to filing suit. A close textual analysis combined with a review of the legislative history convinces us that under § 3730(e)(4)(A) there is *an additional requirement that a qui tam plaintiff must meet in order to be considered an 'original source,' namely, a plaintiff also must have directly or indirectly been a source to the entity that publicly disclosed the allegations on which a suit is based.* (emphasis added)

In *Kreindler*, the plaintiff argued that it did not obtain the "pertinent information 'solely'" from publicly disclosed material but that it also conducted an independent investigation. The Second Circuit did not give this argument any effect. Instead the Second Circuit, citing *U.S. ex rel. Precision Co. v. Koch Industries*, 971 F.2d 548, 543 (10th Cir. 1992), held that a "qui tam action ...based *in any part* upon publicly disclosed allegations or transactions" would be barred. (*Kreindler* at 1158) The Second Circuit places an undue emphasis on the word "information" in 31 U.S.C. § 3730(e)(4)(B). The Second Circuit has set the jurisdictional bar at the point where a suit is barred if *any* of the information used to bring the suit by the *qui tam* plaintiff is publicly disclosed unless it was the relator himself or herself who disclosed the information to the source that published it.[30] This position goes far beyond the "direct and independent" standard that is written into the FCA.

District Judge Marrero in his opinion affirmed by the Second Circuit applied this test to the instant case. He found the Relator failed on two points. First, he ruled the Alcohol Foundation was not an "original source" as interpreted in the Second Circuit. He followed the decisions in *Kriendler* and *U.S. ex rel. Dhawan & Gowie v. New York Medical College*, 252 F.3d 118, 121 (2d Cir. 2001). Judge Marrero stated that the Court lacked subject matter jurisdiction because the

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[30] J. Morgan Phelps, Comment, *The False Claims Act's Public Disclosure Bar: Defining the Line Between Parasitic and Beneficial*, 49 CATH. U. L. REV. 247 (1999).

Alcohol Foundation had "gained some information from the public disclosures." This was decided even though the fact situation of the Alcohol Foundation suit was quite different from *Kriendler* whose information came "as part of discovery in a prior litigation."[31] No weight whatsoever was given to the relator's extensive outside research. Second, since much of the information gathered by the Relator was from scientific and scholarly journals, Judge Marrero found it was covered by the "news media" bar in 31 U.S.C. § 3730(e)(4)(A). This represents an unprecedented distortion of the wording of the FCA as discussed *supra*.

The position of the Second is a minority one. The Third, Fourth, Fifth, Seventh, Tenth, and Eleventh Circuits take a much more direct approach to the question of "original source."[32] All require that the knowledge about the fraud be direct and independent of any public disclosure of the *fraud allegations*. All concur that a relator does not have to be the source to the disseminator that disclosed the allegations in order to be an "original source" within the FCA.

Though the Second Circuit would say it is building upon the Third Circuit decision in *Stinson,* in fact, the Second Circuit's concept of "original source" is distinguishable. The Third Circuit observes that the relator need only "possess substantive information about the particular fraud" in order to satisfy the "original source" requirement (*Stinson* at 1169).[33] On the other hand, the Fourth Circuit takes a somewhat different approach to "original source." A suit can still be brought by a relator who has derived his knowledge from publicly available sources, if he also has direct and independent knowledge aside from those allegations of fraud that have been

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[31] *U.S. ex rel. Alcohol Found. v. Kalmanovitz Charitable F.*, 186 F. Supp.2d 458, (S.D.N.Y. 2002).

[32] Frederick M. Morgan & Julie W. Popham, *The Last Privateers Encounter Sloppy Seas: Original-Source Jurisprudence Under the False Claims Act*, 24 OHIO N.U.L. REV. 163,172 (1998).

[33] *Stinson* (at 1169) does add a modifying clause: "rather than merely background information which enables a putative relator to understand the significance of a publicly disclosed transaction or allegation."

published or broadcast. As Circuit Judge Luttig wrote in *U.S. ex rel. Siller v. Becton Dickinson & Co.*, 21 F.3d 1339, 1351 (4th Cir. 1994):

> Under this reading of section 3730(e)(4), the provision unambiguously does not require, as the Second Circuit has held that it does, that a relator be a source to the original disclosing entity in order to be an 'original source.' Rather it requires only that the relator have direct and independent knowledge of the information underlying the allegations of a false claim and voluntarily provide the information to the government before filing his qui tam action.

The Alcohol Foundation would argue that the Foundation falls within this meaning of "original source" since the founders all have independent personal knowledge and direct experience professionally and/or personally as to the social and medical costs that immoderate or addictive consumption of beverage alcohol places on the public fisc of the federal government. Moreover, the founders backed up their observations with hundreds of pages of information about the marketing and consumption of beverage alcohol; physiological effects; medical expenditures paid through Medicare, Medicaid, and other federally sponsored health insurance; and social costs of inappropriate consumption of alcohol by those who are *underaged* or *abusers* of alcohol or by those who are already addicted to beverage alcohol.

The Alcohol Foundation asks the Supreme Court to reverse the Second Circuit, and set forth uniform standards in accord with Equal Protection jurisprudence of this Court.

2: Second Circuit Disregard of both Government Ethics Rules and Conflicts of Interest of the Attorney General

The second area of concern in the reasoning for granting the Writ is about ***ethics***. Is it axiomatic that allowing a party to mediate his or her own ethical conflict after the commencement

of legal proceedings, is tantamount to "allowing the fox to guard the hen house." It is common sense not to allow such to happen, and it must be against public policy. Otherwise, our entire system of jurisprudence and fairness is undermined. The issue of ethics was raised both on papers before the District and Circuit Courts and orally.

The country's chief law enforcement officer and a former senator from Missouri has taken tens of thousands of dollars in campaign contributions from the Busch family and Anheuser-Busch. It is hard to imagine this person would not be aware of a FCA case against one of his most generous benefactors when it was being handled out of his office in Washington, D.C.[34]

Words such as "materiality" and "appearances" of impropriety can cut in either direction. To date, where government ethics are concerned, these words have been relegated to cutting little more than air. Mr. Ashcroft is this country's chief law enforcement officer and an attorney. The Supreme Court is the ultimate arbiter of the standards to be set for attorney conduct. particularly government attorney conduct.

The public cannot trust its own government if it is otherwise allowed to mediate its own conflicts of interest so that it can bury such claims when they happen to be contrary to the interests of a substantial political contributor. The scales of justice should not be balanced with lucre. Contrary to the aftermath of *Buckley v. Valeo*, 424 US 1 (1976), and at a time when "special interests" have nearly taken over the legislative process, citizens should be able to rely on the fairness of their Government to neutrally arbitrate disputes for the common good and to level the field of access for all voters, as opposed to deciding disputes with a view that favors the most substantial political contributor.

The Attorney General himself publicly set a minimum standard when he recused himself from the Enron case in

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[34]This is especially true given this case involves asking the federal government to try to recover tens of billions of dollars from the beverage alcohol industry. It is of note that the world's largest brewer, Anheuser-Busch, is headquartered in the Attorney General's home state.

accord with conflict of interest rules.[35] But then he appointed his successor Larry Thompson who was a partner from King & Spalding, a law firm that did substantial business with Enron.[36] Both the Bush presidential and Ashcroft senatorial campaigns took substantial political donations from Enron. Thus, it comes as no surprise that any money trails pointing to the White House thereafter seemed to disappear.

And if the Attorney General recused himself in Enron–an act that was a public reinforcement of a discernable standard–one would think he would also have recused himself in the instant matter where he clearly had a personal and financial relationship with Anheuser-Busch.

Further, recusals should be done as a matter of course, as demonstrated by the standard set by former Attorney General Richard Thornburgh, as discussed in *Moog Inc., et al., v. United States of America, et al.*, Misc. CIV-90-215E, (1991). Sad to say, there is an almost total lack of legal decisions and judicial opinions on the enforcement of conflict of interest situations. And "after the fact" bar discipline does little to mollify victims of ethical lapses committed by persons who are otherwise immune from prosecution.

A license to manufacture a product is not a blank check to be free of all social consequences and concomitant obligations to the society issuing the license, nor is it a license to say anything without restriction. Free speech, association, commercial free speech, and equal protection or the "value of a vote," not just the right to vote, seem to gather in a *Palsgraf*-like "zone of danger"[37] for passage under the strict scrutiny

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[35]5 C.F.R. § 2635.402.

[36]Disclosure document. Also see letter from Rep. John Conyers, *available at*: http://www.house.gov/judiciary_democrats/dojenronltr31502.pdf. *See also*: Report of Investifation of Enron Corporation and Related Entities Regarding Federal Tax and Compensations Issues and Policy Recommendation (February 2003), *available at*: http://www.access.gpo.gov/congress/joint/jcs-3-03/vol3.

[37]*Palsgraf v. Long Island Railroad Company*, 248 N.Y. 339, 162 N.E. 99 (1928), and *Derdierian v. Felix Contracting Corp.*, 414 N.E. 2d 666, (1980)

(continued...)

expressed by Justice Scalia for the Court in *Republican Party of Minnesota, et al., Petitioners v. Suzanne White, Chairperson, Minnesota Board of Judicial Standards, et al.*, 536 U.S. 765 (2002).

Statements from the highest government offices of their having a strong moral and spiritual compass are at odds with the reality of the singularly corrosive special interest money of the alcohol, tobacco and firearms industries among those very same government leaders. How else could the Attorney General have publicly "recused" himself from the prosecution of Enron and then appoint a successor who was a partner in a law firm that also did business with Enron? So how can the country's top law enforcement official do such an ethically questionable thing today? Easy. No ethical consequences.

And it was this same chief law enforcement officer, John Ashcroft, the current Attorney General of the United States, who received in excess of $100,000 from Anheuser-Busch and various Busch family members, for his 1994 and 2000 senate campaigns.[38] One would think that given the rather similar set of circumstances and the billions of dollars at stake in the instant case, there should have been a recusal, though it is a no brainer that it should not go to a special prosecutor who was a member of Anheuser-Busch's chief Washington law firm.

It certainly appears that currently there are no meaningful ethical consequences for harboring clear conflicts of interest. And without consequences at the highest political levels, the rules of conduct invite betrayal of the public interest. On the other hand, acceptance of Attorney General Ashcroft's actions mean there are no consequences for ethical violations or for meaningless "show" attempts at following toothless rules. And it is the Attorney General, the chief law enforcement officer of the country, who sets the "outward" standard for the country and for any other lesser officials. Ultimately, continuing to do nothing about these ethical lapses will cause more than the

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[37](...continued)
[New York Court of Appeals].

[38]Disclosure document, www.opensecrets.org and www.commoncause.org.

blindfold to fall from Lady Justice as she drifts over to the highest bidder.

Every year we as a society pay dearly for "semi-regulated" industries like alcohol, tobacco, and firearms to hawk their products with no real regard for public health or safety, and with little to no regard for the bounds of ethics, commercial free speech, and the personal property and liberty rights of others that are impacted by their businesses–450,000 dead each year because of tobacco, 125,000 dead each year because of alcohol, 30,000 dead each year because of guns.[39]

Some would have you believe the vigilance of these industries in the name of personal freedoms is the price we must pay to preserve our individual liberties. Others would call the advocacy of these industries an outright lie. Individual freedom to use their products should not be used as a basis for these companies to hawk their products under the same protection the First Amendment affords to individuals. This is because commercial "free speech" is not found in an image, but rather it is found in the truth. And the truth about the hazards of their own products is something these industries avoid at all cost. So, they spend heavily on the easiest to buy candidate. It really should not be this difficult to try to save the government a few billion dollars.

CONCLUSION

In summary, given the national importance of the beverage alcohol industry fraud, erroneousness of lower court proceedings, conflicts with other courts over the interpretation of the FCA, errors of the Second Circuit, and importance to others similarly situated, there is a clear need for a national interpretation of the law and of congressional intent, as opposed

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[39]McGinnis JM, Foege WH. Actual causes of death in the United States. JAMA 1993; 270: 2207-12. 30,708 people died of firearms in 1998 according to the CDC. *Detailed information available at*: http://www.cdc.gov/nchs/releases/00news/finaldeath98.htm (Accessed May 5, 2003)

to the current multiple differing interpretations by various circuits, and even more lesser but significant variations.

Further, given the national importance of a clear and consistent policy concerning meaningful rules of ethics, their meaningful enforcement, and the impact on the public of their current state of disrepair, the subject of ethics also merits a clear need for guidance from the High Court.

Respectfully submitted,

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